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90-1101

Supreme Court, U.S.
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SUPREME COURT OF THE UNITE[illegible]

OCTOBER TERM, 1990

No.

WILLIAM LEIGHTON,

Petitioner, Objector-Appellant,

v.

(1) BEATRICE COMPANIES, Inc. et al.

(2) Kohlberg Kravis Roberts & Co.,

and Joel B. Smilow,

(3) James L. Dutt,

Respondents, Defendants-Appellees.

PETITION FOR CERTIORARI

TO THE SUPREME COURT OF DELAWARE

AND APPLICATION FOR A CONTINUANCE

William Leighton
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

January, 1991

QUESTIONS PRESENTED

1. Whether the Delaware Supreme Court had jurisdiction over the person of petitioner, a resident and citizen of New York, to order petitioner to pay $6,194.54, $3,774.02, $318.00, $367.10, $1,399.62 and $2,586.41 to Delaware, Illinois and New York attorneys, respectively, three years after the case had been closed by the issuance of the mandate, without an evidentiary hearing, findings of fact or conclusions of law.

2. Whether the award of costs and expenses to attorneys in a conflict of interest, without a hearing, findings of fact and conclusions of law, does not violate the Due Process of the Laws clause of the Fourteenth amendment to the Constitution of the United States.

3. Whether an appeal taken in aid of this Court's certiorari jurisdiction in

No.87-304, October Term, 1987, was frivolous where such appeal sought State court determinations of issues arising under Article VI, Section 2 of the Constitution of the United States, the Investment Company Act of 1940, the Securities Exchange Act of 1934 and the Securities Act of 1933.

4. Whether the attorneys to whom the Delaware Supreme Court has awarded costs and expenses in September, 1990 and who have appeared "of counsel" in No. 87-304, October Term, 1987, should be disciplined pursuant to Rule 8 of this Court for having filed a brief in opposition to that petition for certiorari that has misled this Court and that has concealed respondents' ongoing fraud upon the stockholders of Beatrice Companies, Inc.

5. Whether the Delaware judges' obstruction of the administration of the federal securities laws should not be set aside and enjoined pursuant to the All Writs Act as being contrary to Article VI, Section 2 of the Constitution of the United States.

LIST OF ALL PARTIES TO THE PROCEEDING

Please see footnote 3.

3/ The appellees below, App.6a, are : Beatrice Companies, Inc. William O. Granger, Jr., Frank E. Grzelecki, David E. Lipson, Anthony Luiso, William S. Pigott, Angelo R. Arena, Bernard A. Monaghan, Omer G. Voss, Murray L. Weidenbaum, Alexander Brody, G.A. Constanzo, Walter J. Leonard, Goff Smith, James W. Cozad, James L. Dutt, Frederic E. Ritchie, Kohlberg Kravis Roberts & Co. On March 11, 1986, the general partners of Kohlberg Kravis Roberts & Co. were : Jerome Kohlberg, Jr., Henry R. Kravis, George R. Roberts and Robert I. MacDonnell.

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Harris Trust et al. v. E-II Holdings et al., 722 F. Supp. 429 (N.D. Ill., 1989), appeal pending, No. 90-1095, Seventh Circuit. 16

Herman & MacLean v. Huddleston, 359 U.S. 375 (1983) 30

Merritt Chapman & Scott v. Wolfson, 321 A. 2d 138 (Del. Supr., 1974) 36

Salomon Brothers v. Interstate Bakeries Corp., 576 A. 2d 650, 654 (Del. Ch. 1989). 32

OFFICIAL AND UNOFFICIAL REPORTS BY THE COURTS BELOW

The orders issued by the courts below, all of which are reproduced in the appendix, have not been published.

JURISDICTION

The jurisdiction of this Court is

invoked pursuant to 28 U.S.C. Sec. 1257(3). The claim under the Due Process clause of the Fourteenth Amendment was set up in petitioner's statement of position, App. 44a. The claim under Article VI, Section 2 was set up in petitioner's petition for rehearing ("reargument") under local practice). The petition was denied on October 11, 1990, App. 56a-58a.

CONSTITUTIONAL PROVISIONS, STATUTES etc. INVOLVED

(a) Article VI, Section 2 of the Constitution of the United States.

(b) The Due Process clause and the Equal Protection of the Laws clause of the Fourteenth Amendment to the Constitution of the United States.

(c) The Investment Company Act of 1940.

(d) The Securities Exchange Act of 1934.

(e) The Securities Act of 1933.

(f) Section 327 of the Delaware Corporation Law.

(g) Section 145 of the Delaware Corporation Law.

(h) Delaware Supreme Court Rule 18.

(i) Delaware Supreme Court Rule 20(f).

The relevant portions of these statutes and rules will be found in the appendix.

STATEMENT OF THE CASE

This is a petition for certiorari by a New York citizen and resident to review and set aside the decree of the Delaware Supreme Court ("court below"), dated September 7, 1990, App. 47a-56a, imposing costs and expenses upon petitioner in favor of six attorneys for the respondents based on a determination

made in October, 1987 that the underlying appeal was frivolous. Rehearing was denied by order dated October 11, 1990, App. 56a-58a.

The case was before this Court in No. 87-304, October Term, 1987 when certiorari was be denied, 484 U.S. 898 (1987). Rehearing was also denied. 484 U.S. 971, (1987).

In fact, during the period that the petition in No. 87-304 was being prepared for filing (after two extensions of time had been granted by Justices of this Court), the respondents were engaged in a conspiracy to violate, and did violate, several federal securities laws for the purpose of their unjust enrichment. For this reason, petitioner moved to vacate the judgment underlying the proceedings in No. 87-304. When that effort failed at the

trial court level in July, 1987, App. 1a-5a, petitioner appealed to the court below in compliance with this Court's holdings that all State remedies must be exhausted before a petition for certiorari will be considered.

The court below below ignored the pendency of the certiorari proceeding and dismissed the appeal on October 16, 1987, App. 6a-24a. Its order provided that the respondents' attorneys could file affidavits with respect to their alleged costs and expenses within thirty days. The attorneys failed to do so within that period of time and the mandate issued, App. 24a-25a. After that, five attorneys filed substantially identical affidavits, App. 25a-36a, claiming a total of $14,641.69 in "costs and expenses" allegedly incurred by them. None of these affidavits disclosed whether the

attorneys had been paid from some other source such as insurance carriers or their own clients, respondents here. The Beatrice-BCI merger contract specifically provides for the reimbursement of costs and expenses for a period of six years after the "Effective Date" of the merger, i.e. until April 17, 1992 inclusive. The court below found this to be "immaterial" to the defense presented by petitioner, App. 54a.

Petitioner promptly challenged the jurisdiction of the court below to consider the attorneys' requests since the mandate had issued and the case had been marked "closed". By order dated November 27, 1987, App. 37a-40a, the court below rejected the challenge and gave petitioner thirty days within which to submit a Statement of Position.

Petitioner did so but the

respondents failed to respond. Whereupon, the court below entered yet another order dated March 30, 1988, App. 42a-47a, acknowledging petitioner's Statement of Position, ignoring respondents' failure to respond thereto and affording petitioner the opportunity to file a Further Response by April 30, 1988. Petitioner complied with this order. Two years and four months later, on September 7, 1990, the court below entered an order imposing total "costs and expenses" upon petitioner in the amount of $14,641.69, App. 47a-56a. The respondents had not been heard from since November 16, 1987.

In addition, the court below imposed a "gag order" upon petitioner on March 30, 1988, which was designed to protect the respondents from challenges to their ongoing unjust enrichment, App. 41a-42a. In effect, the "gag order"

provided the respondents with an incentive to perpetrate a fraud upon the buyers of securities issued by a corporation, E-II Holdings, Inc., which had been formed by the respondents Kohlberg, Kravis, Roberts & Co. ("KKR") soon after the judgment sought to be reviewed in No. 87-304 became final. The fraud has been set forth at length in a suit filed by the Trustees under the indentures issued by E-II in a Chicago federal court. Harris Trust et al., v. E-II Holdings et al., 722 F. Supp. 429 (N.D. Ill., 1989), appeal pending, No. 90-1095, U.S. Court of Appeals for the Seventh Circuit. Due to the errors of the Delaware courts, the Harris suit is being decided without regard to respondents' recklessly illegal conduct.

WHEN AND HOW

THE FEDERAL QUESTIONS WERE RAISED

Petitioner raised the federal questions within one month after BCI's prospectus dated March 11, 1986 became effective under the Securities Act of 1933. The prospectus is not a part of the record because the Delaware judges have consistently refused to make it so. The questions were adverted to but not passed upon by the Chancellor in his opinion of April 16, 1986. The federal questions were again raised on appeal from the Chancellor's judgment of April 16, 1986 and were briefed by the respondents in opposition. The Delaware Supreme Court did not pass upon them in its order of February 20, 1987 dismissing the appeal from that judgment.

Petitioner again raised federal

questions in his application to vacate the judgment of April 16, 1986 made to the Chancellor. This time the Chancellor did not pass on those questions. App. 1a-4a. On the appeal here involved, petitioner again raised these federal questions and the court below enumerated them in its order of October 16, 1987, App. 18a-19a.

Following the entry of the final order dated September 7, 1990 imposing sanctions, petitioner moved the court below for leave to file a petition for rehearing setting forth other federal questions arising out of that order. The motion set up the federal claims with specific reference to 28 U.S.C. Sec. 1257(3). The motion was allowed but the petition for rehearing was denied as being "without merit", App. 56a-58a.

In accordance with Rule 13.4 of this Court, this petition for certiorari

is submitted for filing within ninety days from the date of the order denying rehearing.

ARGUMENT

Point I. The proceedings in No.87-304 October Term, 1987 should be judicially noticed

This proceeding is a continuation of No. 87-304, October Term, 1987, which ended on November 30, 1987 with the denial of the petition for rehearing. The actual sanctions were imposed upon petitioner on September 7, 1990. Rehearing was denied on October 11, 1990.

A supervening event is the decision of the Chicago federal district court in Harris, supra, which became final in January, 1990, and which is now on appeal to the Seventh Circuit, No. 90-1095 in that court. Whichever side

loses the Harris case, is sure to seek review here by petition for certiorari. At that point, the Harris case should be consolidated for hearing and decision with this case because the actions of the Delaware courts have obstructed fact finding in Harris.

The point has been made below and is repeated here: it was the duty of the Delaware courts to reopen the judgment of April 16, 1986 in light of the transactions in the properties of Beatrice that were made by the respondent KKR after that date. The Delaware courts have refused to do so and have invoked a State statute, 8 Del. C. Sec. 327, as their "authority" for obstructing the course of justice in the Federal courts of the Seventh Circuit. The obstruction comes in the nature of a jurisdictional controversy, namely, whether the Chicago courts or the

Delaware courts should decide if KKR's acquisition of Beatrice's 15 businesses was in accordance with Section 7 of the Investment Company Act as to which the Delaware courts have jurisdiction pursuant to Section 44 of that Act. If the acquisition was prohibited by that statute, then the Beatrice-BCI merger contract must be voided, with all the consequences which that implies for the Seventh Circuit litigation.

Assuming, as petitioner must, that the Harris litigation will come before this Court, it is imperative that this Court should have all the facts before it, the "facts of record" and the "facts not of record".

The connection between Harris and this case is also shown by the appearance of Winston and Strawn, Esqs. of Chicago, Illinois in both cases.

Kurt L. Schultz, Esq. of Winston & Strawn has appeared in No. 87-304, presumably on behalf of Beatrice. In Harris, Timothy J. Rivelli, Esq., Terry M. Grimm, Esq. and Gregory J. Bueche, Esq., of Winston & Strawn, have entered their appearances on behalf of E-II in the Seventh Circuit. Beatrice and E-II have the same address, Two North LaSalle Street, Chicago, IL 60602.

Also, in No. 87-304, Warren R. Stern, Esq. of Wachtell Lipton Rosen & Katz has appeared on behalf of Beatrice. Mr. Stern's law partners, Robert B. Mazur, Esq. and Eric M. Roth, Esq. are attorneys of record for American Brands, Inc. in the Harris case. American Brands is the buyer of the 15 businesses that belonged to Beatrice as late as July 2, 1987. In short, Wachtell Lipton have appeared for both seller (Beatrice) and buyer (American Brands) in the

transaction, less than one year apart (July, 1987 - February, 1988).

These are obvious conflicts of interest which the Seventh Circuit has not had an opportunity to rule on. There is no reason why this Court should decide whether certiorari ought to be granted or denied in this and the Harris case without these conflicts of interest being spelled out on the record.

Point II. The Delaware judges' total disregard for this Court's certiorari jurisdiction and for the commands of federal law

The events preceding and following the filing of petitioner's petition for certiorari in No. 87-304, October Term, 1987 ("87-304") lie at the core of the instant proceeding.

To start with, Article VI, Section 2 of the Constitution of the United

States requires State judges to conform their decisions and practice to federal law. Here, State judges using Sec. 327 of the Delaware Corporation Law, 8 Del. C. ("Section 327") as an obstruction, have refused to enforce the Securities Act of 1933 and the Investment Company Act of 1940, two statutes which expressly confer jurisdiction upon State courts, Sec. 22(a) of the 1933 Act and Sec. 44 of the 1940 Act.

While certiorari was being sought in 87-304, the State judges continued to ignore that proceeding even though they had notice of it. Two extensions of time to file that petition were granted by Justices of this Court on June 19 and July 22, 1987, respectively, on notice to the clerk of the Delaware Supreme Court. Notice of the filing of the petition and of respondents' answer thereto was given on September 21, 1987.

Nevertheless, the Delaware judges continued to defy federal law and entered their order of October 16, 1987, App. 6a-24a which, as it now turns out did not put an end to the controversy. The end came three years later, on when the Delaware judges entered yet another order imposing sanctions upon petitioner and in favor of respondents' attorneys, App. 47a-56a, and after denying petitioner's petition for rehearing as being "without merit", App. 56a-58a. Where a court reaches the merits of a petition for rehearing, State judges should be required to spell out their reasoning for the benefit of this Court. The Delaware State judges have not done so here.

Tne Delaware judges' disregard for their obligations under Article VI, Section 2 has resulted in the obstruction of justice in the federal

courts of the Seventh Circuit and the unjust enrichment of KKR in violation of Section 47(b)(3)(B) of the 1940 Act, 94 Stat. 2277. The Harris case which is slowly making its way to this Court, shows how respondent KKR, alias E-II, has succeeded in borrowing from the public on July 2, 1987 $1,500,000,000 against Beatrice assets with a book value of $1,067,542,000 inclusive of "intangible assets" of $476,230,000, i.e. a net of $591,312,000. At the very moment the borrowing was being made, the respondents KKR were persuading the Chancery Court not to reopen the judgment that had permitted the transfer of these assets from Beatrice to KKR, App. 1a-4a.

The Harris courts have no knowledge of these transactions and occurrences, see the opinion of the lower court at 722 F. Supp. 429. The

Harris lower court has assumed that the transfer had been "legal" for which reason declaratory judgment relief has been denied. Of course, if the transfer had been "illegal", the Harris court would have been justified to void the indentures pursuant to which KKR had borrowed $1,500,000,000 from an unsuspecting public.

Simply put, the respondents KKR are making money by confusing the courts and by manipulating judicial proceedings in three courts. In this endeavor, the respondents have been aided and abetted by the attorneys who have signed the brief in opposition to the petition in 87-304. That is why these attorneys should be disciplined pursuant to Rule 8 of this Court.

Point III. The violation of the Due Process clause by the Delaware appellate judges

In Delaware, there is only one appellate court, the Delaware Supreme Court. Its procedures are regulated by its Rules which are frequently "bent" in order to suit the State's attitude of hospitality to out-of-state corporate insiders. Out-of-state residents, such as petitioner, come before the Delaware courts by reason of their ownership of stock issued by Delaware corporations, such as Beatrice and BCI. These corporations are the product of a mail order system that seeks to attract as many out-of-state incorporators as possible because Delaware derives a substantial portion of its revenues from franchise fees paid by these corporations. It takes but one person to incorporate in Delaware and that

person can be the corporation's sole director and chief executive officer. This is what KKR have done here within one year of taking over Beatrice. As was determined by the Harris case, BCI, KKR's alter ego, had created E-II to whom it had transferred fifteen Beatrice businesses, 722 F. Supp. at 429.

As the ultimate overseer of this system, the Delaware appellate judges take liberties with the federal rights of out-of-state residents at the instance of corporation lawyers. The judges' philosophy seems to be : we'll do whatever we want in order to please the lawyers and their corporate clients, let the stockholders go to the U.S. Supreme Court and seek their remedies through the certiorari system.

The Delaware appellate judges do not sit only as an appellate court.

They also sit as a trial court making factual determinations where none had been made by the lower courts, as has happened here since at least March 11, 1986. The record shows that the Chancery Court's letter memorandums cover only four pages of the appendix, App. 1a-4a. The Delaware appellate judges' orders based thereon cover forty pages of the appendix, 6a-24a, 37a-40a, 41a-42a, 42a-47a, 47a-56a, 56a-58a.

These procedures violate the Due Process clause of the Fourteenth Amendment because the appellants are not given adversarial, evidentiary hearings. No such hearing has been held here and the record shows it, App. 53a.

On March 11, 1986, the respondent KKR alias BCI came out with a prospectus covering the BCI preferred that was to be issued and that was actually issued in connection with the Beatrice-BCI

merger. The prospectus, which had been filed with the S.E.C., was on some 216 pages and stated that it was valid until June 9, 1986. It covered transactions in Beatrice common stock for the period from March 11, 1986 through April 17, 1986, the "Effective Date" of the merger. Within the period of its validity, Beatrice was dissolved and liquidated by KKR on May 26, 1986, a fact duly noted but not ruled upon by the Delaware appellate judges, App. 18a at (E).

Over petitioner's objections, the prospectus never made it as a part of the record. Neither the Chancery judge nor the appellate judges have ever considered the contents of this prospectus despite their obligation to do so, see Section 22(a) of the Securities Act of 1933, and their constitutional obligation to abide by

that statute, see Article VI, Section 2. Obviously, the Delaware judges are taking a frivolous view of their obligations under the statute and the Constitution.

The prospectus was false, misleading and omitted to state material facts. These were (a) that KKR had control over a majority of Beatrice's outstanding voting stock which had been accumulated since July, 1985 by KKR-controlled limited partnerships, (b) that registration of BCI under the 1940 Act or an exemption therefrom had neither been made nor secured and (c) that the financing of the merger had not been approved by the Federal Reserve Board as being in compliance with Regulations G, U and X under Section 7 of the 1934 Act. It was circulated in order to deceive prospective buyers of Beatrice stock which was to be

exchanged, in part, for BCI preferred stock. The Beatrice stock continued to be traded on the New York Stock Exchange through April 17, 1986.

Prospective buyers of Beatrice stock were misled by these statements in the prospectus : "There are no federal or state regulatory requirements which remain to be complied with in order to consummate the Merger".

Through this deception, KKR's dreams of unjust enrichment were realized and came to light in the Harris decision which became final in December, 1989, more than three years later.

In Herman & MacLean v. Huddleston, 359 U.S. 375 (1983), this Court has set forth at length the obligations incurred by the issuer of a security and his absolute liability, even for innocent misstatements. And in Basic Inc. v. Levinson,, 485 U.S. 224 (1987), this

Court has outlined the principles which lower courts must follow in merger cases where the contestants are the shareholders against the corporation. Ignoring all of this, the Delaware judges have imposed another standard, the purchase-of-claim standard of 8 Del. C. Sec. 327.

According to that standard, one who purchases the stock of a Delaware corporation on the basis of a statutory prospectus has no right to challenge statements made in the prospectus that turn out to have been false, misleading and omissive of material facts. The purchaser of the stock does not even have the right to challenge post-purchase transactions and occurrences because he is presumed to have purchased the stock for the purpose of making such a challenge.

Not so, though, for the purposes

of the Delaware appraisal statute, 8 Del. C. Sec. 262. Just recently, a Chancery Court judge held in Salomon Brothers v. Interstate Bakeries Corp., 576 A. 2d 650, 654 (Del. Ch., 1989) :

> I find nothing in the purpose or language of Sec. 262 that would defeat Salomon's entitlement to an appraisal and I find nothing inequitable about an investor purchasing stock in a company after a merger has been announced with the thought that, if the merger is consummated on the announced terms, the investor may seek appraisal.

Therefore, the theory goes on, if such a challenge is made, as it was made here by this petitioner, the challenge is "frivolous" and the challenger must be sanctioned with the imposition of "costs and expenses" regardless of whether such costs and expenses have been reimbursed to the claimants by insurance carriers.

Tne claims made by petitioner on appeal were summarized by the Delaware

appellate judges, App. 18a-19a. None of these claims were disposed of on the merits and none were heard. Rather, the appellate judges held, at 19a, that the claims should have been made on March 6, 1986, fully fifteen months before the challenged transactions had been effected !

The holdings and procedures of the Delaware appellate judges are wanting in logic, defy reason and are arbitrary, capricious and ultra vires. They do not conform to Braley v. Campbell, 832 F. 2d 1504 (10th Cir., 1987), which the Delaware judges have adopted as their guide to decision.

Point IV. The respondents have not been heard from since November 16, 1987. Their arguments should not be initially heard by this Court in opposition to

this petition

The respondents have used hit-and-run tactics in the court below. After filing their affidavits on November 16, 1987 they have stood mute since they did not wish to disclose the manner in which they had been reimbursed by insurance carriers or by the charge-off to the $3,200,000 fee that had been allowed to the plaintiffs' attorneys by the Chancery Court. The record shows that the respondents did not take issue with petitioner's Statement of Position and with petitioner's Further Response. At that point, the Delaware appellate judges should have deemed petitioner's allegations to be true and should have terminated the proceedings.

Instead, twenty eight months later, the Delaware appellate judges entered their September 7, 1990 order,

App. 48a-57a and rewarded the respondents with an award of "costs and expenses" that had already been paid to the respondents by insurance carriers. The order does not even name the plaintiffs as parties to the proceeding but rewards their attorneys with $3,986.01 in addition to the $3,200,000 fee awarded by the Chancery Court to these attorneys. Please see p. 39a of the appendix in 87-304.

The Delaware appellate judges are evidently unaware of what constitutes Due Process of Law guaranteed by the Fourteenth Amendment. Since the respondents have created the problem and have failed to answer the Statement of Position and the Further Response, they should not be heard by this Court for the first time in opposition to this petition which is based on those pleadings.

Point V. Section 145 of the Delaware Corporation Law violates the Equal Protection of the Laws clause because it promotes the Delaware mail order system of corporate fraud

In order to protect its system from challenges under the federal constitution and laws, Delaware has enacted a law, Section 145, which gives corporate insiders unlimited cash advances for the purpose of defending against such challenges. Even convicted felons are entitled to cash advances for the purpose of defending against claims of corporate wrongdoing, Merritt Chapman & Scott v. Wolfson, 321 A. 2d 138 (Del. Supr., 1974).

The out-of-state objector, like petitioner, appearing in opposition to the "settlement" of suits charging

corporate fraud, like the instant suit, does not have a chance in a million in the Delaware courts. To begin with, the record is several hundred miles away from the objector's place of residence which means that the shareholder must either (a) at his own expense, retain Delaware counsel, who is generally not available, or (b) proceed pro se by written submissions. No one could match the financial muscle available to the insiders here. According to the prospectus, $53,750,000 was paid to insiders, including $45,000,000 to respondent KKR. This was in addition to the cash advances authorized by Section 145.

The respondents have retained counsel to maneuver the proceedings in No. 87-304 in such a way as to provide KKR with undreamed of profits. See

Harris, supra. These were realized in February, 1988 by and with the advice of the same counsel who had "found" buyers for parts of Beatrice. The buyers had been held back by counsel from bidding, in March 1986, for the parts of Beatrice that had been reserved for KKR as the lion's share of the kill. This conflict of interest on the part of counsel was again presented to the Delaware appellate judges in the petition for rehearing ("reargument" under local rule). It was overruled as being "without merit", App. 58a.

Point VI. The continuing obstruction of federal law

The Beatrice-BCI merger would not have been possible without the illegal "junk bond" financing provided by Drexel Burnham Lambert, Inc. ("Drexel"). On September 11, 1989, Drexel has pleaded guilty in the U.S.

District Court for the Southern District of New York to four counts of securities fraud and to two counts of mail fraud. It was sentenced to pay a fine of $78,000,000 and criminal penalties of $222,196,770.97, No. 88 Crim 41 KMW.

Following this plea, Drexel filed for bankruptcy in the same court on May 29, 1990, No. 90 B 11646 and is now effectively out of business. Drexel had realized $86,187,500 as "underwriting discounts" for a total of $2,500,000,000 in junk bonds which provided the core of the Beatrice-BCI merger financing. As a quid pro quo, Drexel received from KKR warrants to purchase BCI stock at $5 per share. Based on the final accounting with respect to these securities, Drexel appears to have an unrealized profit of $650,000,000. No disclosure had been made in the March 11, 1986 prospectus

that Drexel would receive any such warrants. The attorneys here involved had been given an opportunity to review the prospectus before mailing and had failed to disclose the fraud then being perpetrated upon Beatrice's shareholders.

In order to protect Drexel and KKR from the consequences of their actions, the attorneys here involved had also agreed upon the terms of an injunction running as to all Beatrice shareholders enjoining them from filing any actions against Drexel and KKR subsequent to the settlement. The injunction has not been served upon the Beatrice shareholders individually and the court below, bending its rules, has refused to require the defendants to make such service.

The result has been that no former Beatrice shareholder, other than

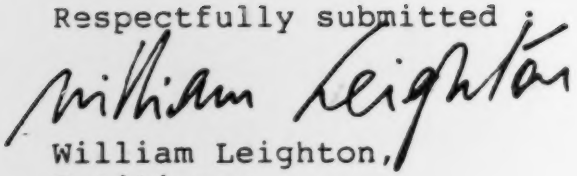
this petitioner, has sought relief from the judgment of April 16, 1986, App. 1a-4a. And for seeking such relief, the court below has imposed "costs and expenses" upon petitioner in favor of the attorneys who had combined, conspired, agreed and did damage Beatrice shareholders for the purpose of unjustly enriching Drexel and KKR, in violation of Section 47(b) of the 1940 Act, (App. 65a) and Section 7 of the 1934 Act, (App. 67a).

CONCLUSION

The petition for certiorari should be granted and the September 7, 1980 order of the Delaware Supreme Court should be summarily reversed.

This case may involve 28 U.S.C. Sec. 2403(b). Copies of this petition have also been served by mail upon the Attorney General of the State of Delaware.

Respectfully submitted ;



William Leighton,
Petitioner

January, 1991

APPLICATION FOR A CONTINUANCE

Pursuant to Rule 15.7 of the Rules of this Court petitioner hereby prays that this petition for certiorari be continued on this Court's docket pending decision by the Seventh Circuit on the appeal in the Harris case before it. The appeal has been argued on October 30, 1990.

In the Harris case, the district court had made these findings of fact which are clearly erroneous, F.R.Civ.P. 52(a) :

> In April 1986, BCI Holdings Corporation ("BCI") acquired Beatrice Companies, Inc. ("Beatrice") in a $6.2 leveraged acquisition (cmplt., para. 11). Subsequent to the acquistion of Beatrice, E-II was formed by BCI. In May, 1987, E-II had an initial portfolio of fifteen businesses that were once part of Beatrice. * * * On July 1, 1987, pursuant to Indentures, E-II issued to the public $1.5 billion in public debt : $$750 million in Notes and $750 million in Debentures. With respect to all relevant matters herein, the Indentures are identical. In the prospectus for the sale of both Notes and Debentures, E-II represented that it

would use a substantial portion of the proceeds of the public debt offering to pursue acquisitions for the holding company. (complt., para 16). See 722 F. Supp. at 429 ff:

Depending on how the Seventh Circuit disposes of the appeal before it, a supplemental brief may have to be filed in this Court, as authorized by Rule 15.7 for the purpose of showing that

(a) BCI has acquired Beatrice in violation of Section 7(a) of the 1940 Act and Regulations G, U and X under Section 7 of the 1934 Act; BCI had not registered as an investment company in accordance with the requirements of the 1940 Act;

(b) BCI was at all times 97% or more controlled by the respondents Kohlberg Kravis, Roberts & Co. ("KKR");

(c) E-II was created by KKR for the purpose of acquiring control of corporations engaged in interstate

commerce, without registering as an investment company under the provisions of the 1940 Act;

(d) Through Drexel, E-II has issued its public debt in violation of Regulation G under Section 7 of the 1934 Act and Section 7(a)(2) of the 1940 Act; that debt is now practically worthless owing to EII's inability to service it;

(e) the Delaware courts bear their share of the responsibility for this state of affairs due to their approval of the settlement of the Beatrice matter, please see the pleadings in 87-304.

Respectfully submitted :

William Leighton
Petitioner

January, 1991